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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO ANTONIO VARGAS, Defendant and Appellant.	H045746 (Monterey County Super. Ct. Nos. SS170836A, MS334372A)

I. INTRODUCTION

In 2015, defendant Gustavo Antonio Vargas was placed on probation for misdemeanor giving false information to a police officer (Pen. Code, § 148.9, subd. (a))[1] and misdemeanor driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) in case No. MS334372A. In 2017, he was again placed on probation for carrying an unregistered loaded firearm (§ 25850, subds. (a) & (c)(6)) and misdemeanor resisting an officer (§ 148, subd. (a)(1)) in case No. SS170836A.

In 2018, the trial court found that defendant had violated his probation in both cases by failing to abstain from controlled substances, failing to report for a scheduled appointment, failing to report a change of address, and violating the law by providing false information to a police officer (§ 148.9, subd. (a)). The trial court revoked

[1] Unspecified statutory references are to the Penal Code.

probation in both cases and sentenced defendant to a term of 16 months in prison in case No. SS170836A, consecutive to a term of 364 days in county jail in case No. MS334372A.

On appeal, defendant argues that the trial court erroneously admitted the result of his presumptive drug test during the probation violation hearing. In part, he contends that the prosecution failed to lay an adequate foundation to permit admission of the presumptive drug test result because it is unclear if the test is generally accepted under the *Kelly/Frye*[2] rule or if it required expert testimony for its admission. Assuming that defendant's arguments were preserved on appeal and the presumptive drug test result was admitted in error, we conclude that any error was harmless. We affirm the judgment.

II. BACKGROUND

A. *Case Nos. MS334372A and SS170836A*[3]

In 2015, defendant pleaded no contest to misdemeanor giving false information to a police officer (§ 148.9, subd. (a)) and misdemeanor driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) in case No. MS334372A and was placed on three years' probation with imposition of sentence suspended.

In 2017, defendant pleaded no contest to carrying an unregistered loaded firearm (§ 25850, subds. (a) & (c)(6)) and misdemeanor resisting an officer (§ 148, subd. (a)(1)) in case No. SS170836A and was placed on three years' probation with imposition of

[2] See *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. In *People v. Bolden* (2002) 29 Cal.4th 515, 545, the California Supreme Court explained that the *Kelly/Frye* rule "is now referred to simply as the *Kelly* test or rule."

[3] The facts underlying defendant's crimes are not relevant to the issues raised by defendant on appeal.

sentence suspended.[4] Defendant's probation in case No. MS334372A was revoked and reinstated.

B. ***The Probation Violation Notices***

On January 2, 2018, a probation violation notice was filed by the probation department. The notice alleged that defendant (1) "failed to abstain from the use of [a] controlled substance on November 22, 2017," (2) "failed to report for a scheduled appointment on November 29, 2017," and (3) "failed to report a change of address."

That same day, the district attorney also filed a probation violation notice, which had a supporting declaration alleging that defendant had violated sections 148.9, subdivision (a) (providing false information to a police officer) and 466 (possessing burglary tools).

C. ***The Probation Violation Hearing***

On February 1, 2018, the trial court held a probation violation hearing. During the hearing, the probation officer who administered a presumptive drug test on defendant testified. The probation officer had been employed by the probation department for 16 years. As part of his duties, the probation officer tested probationers for illicit substances. He described his drug testing procedure as follows: "We obtain a urine sample from them, and I collect them by using a sterile collection cup. [¶] . . . [¶] Then we use a five-strip panel drug-testing kit that tests for five different drugs or narcotics." The probation officer had used this method to test for substances "[a] little over 100 times."

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[4] Both defendant and the Attorney General state that defendant also pleaded no contest to a third count, possession of a firearm with identification numbers removed (§ 23920). However, the record reflects that when defendant pleaded no contest to counts 1 and 2, count 3 was submitted for dismissal at the time of sentencing. Count 3 was thereafter dismissed at sentencing.

The probation officer testified that he tested defendant for substances on November 22, 2017, and that he "follow[ed] the normal procedure when [he] tested [defendant]." When the probation officer was asked what result was obtained, defense counsel objected, stating: "Objection. Lacks foundation, calls for expert testimony." The trial court overruled defense counsel's objection. The probation officer testified that defendant "tested presumptively positive for methamphetamine."

Next, the probation officer testified that he submitted a sample of defendant's urine to a lab to confirm the presumptive drug test result. The confirming drug test result reflected that defendant's sample tested positive for amphetamine. Defense counsel objected to the admission of the confirming drug test result, stating that it was "hearsay" and its admission would violate the "[C]onfrontation [Clause] pursuant to the 14th Amendment." The trial court overruled this objection.

The probation officer also testified that he had attempted to contact defendant at his provided address on December 27, 2017, but defendant's father had told him that defendant no longer lived there.

During cross-examination, the probation officer testified that he did not speak with the scientist or lab technician who analyzed defendant's sample for the confirming drug test. Moreover, the probation officer did not have any training on how the lab conducted its analysis. The probation officer said he was aware that the lab test may generate false positives, but he was unaware of the exam's error rate. The probation officer said he knew that the lab result should be confirmed with a "GCMS" test, but the GCMS test was not completed in defendant's case. Defense counsel did not cross-examine the probation officer about the presumptive drug test.

After the probation officer finished testifying, defense counsel stated that he would like to "renew [his] motion to strike . . . the results of the test." The court responded, "Objection is vague as to results of the test. [¶] We have two tests, presumptive and the

confirming. I'm assuming your objection relates to the confirm." Defense counsel responded, "Yes, that's correct." Thereafter, the court sustained defense counsel's objection to the confirming drug test result.

A different probation officer testified that defendant failed to report for a scheduled appointment on November 29, 2017.

Lastly, a California Highway Patrol officer testified that defendant gave a false name during a traffic stop. During the traffic stop, the officer searched defendant and found a shaved key in his pants pocket.

At the end of the hearing, defense counsel argued that the trial court should find there was insufficient evidence that defendant had violated his probation. With respect to the allegation that defendant had tested positive for a controlled substance, defense counsel noted that he believed the trial court had correctly excluded the results of the confirming drug test. Defense counsel further stated, "We don't believe that the information provided by the probation officer, number one, that adequate foundation was laid for the interpretation and admissibility for the test; and two, that the accuracy of any type of test is sufficient even at a preliminary hearing level to sustain the allegation [of drug use]."

Subsequently, the trial court made the following determinations: "With respect to the petition filed on January 2nd, I do find based upon the evidence presented that the [d]efendant failed to abstain from the use of controlled substances; that he failed to report for a scheduled appointment and that he failed to report a change of address. [¶] With respect to the violations of law, I do find that he violated Penal Code Section 148.9(a); I do not find sufficient evidence as to a violation of Penal Code Section 466. Accordingly, I do find the [d]efendant is in violation of his probation."

D. *Sentencing*

On February 14, 2018, the probation department prepared a supplemental probation report. For case No. SS170836A, the supplemental probation report recommended that the trial court impose a prison sentence "for the term prescribed by law," suspend the execution of the sentence for the remainder of the probationary period, and reinstate probation under the original terms with the addition of a condition that he serve 1 day in county jail. For case No. MS334372A, the supplemental probation report recommended that defendant's probation be revoked and terminated "after serving 364 days."

On April 12, 2018, the trial court held a sentencing hearing. During the sentencing hearing, the probation officer clarified that the department was recommending defendant's probation in case No. SS170836A be "extended to January 7th of 2021." The court asked defense counsel for his comments, and defense counsel responded, "Rather than impose the execution of sentence or execution of 1170(h) sentence recommended by probation, we're asking the Court rather to impose a 16-month term in this case. Given other matters that [defendant] has, we believe that this is the appropriate disposition in this case. Although [defendant] would like the assistance of probation, we believe that he's not going to be able to avail himself to these because of obligations in other locations. So we're asking the Court to impose a 16-month term."

Thereafter, the trial court revoked probation in both cases and sentenced defendant to a term of 16 months in prison in case No. SS170836A, consecutive to a term of 364 days in county jail in case No. MS334372A.

III. DISCUSSION

On appeal, defendant challenges the trial court's admission of the presumptive drug test result that showed he tested positive for methamphetamine. He contends that the prosecution failed to lay an adequate foundation for the presumptive drug test result

and that the probation officer was improperly allowed to testify about the test result without having been qualified as an expert. As we explain, we conclude that even if we assume defendant's arguments were properly preserved on appeal and the evidence was admitted in error, any error was harmless.

A. *Legal Principles*

Before we address defendant's arguments, we briefly review the legal principles governing probation violation hearings and the applicable standard of review.

" 'In placing a criminal on probation, an act of clemency and grace [citation], the state takes a risk that the probationer may commit additional antisocial acts. Where probation fails as a rehabilitative device, as evidenced by the probationer's failure to abide by the probation conditions, the state has a great interest in being able to imprison the probationer without the burden of a new adversary criminal trial. [Citation.]' [Citation.] The role of the trial court at a probation revocation hearing is not to determine whether the probationer is guilty or innocent of a crime but whether he can be safely allowed to remain in society." (*People v. Monette* (1994) 25 Cal.App.4th 1572, 1575.)

"Before a defendant's probation may be revoked, a preponderance of the evidence must support a probation violation." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197.) The trial court has "very broad discretion in determining whether a probationer has violated probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443.) Thus, we will reverse a decision to revoke probation only upon a showing of abuse of discretion. (*Id.* at p. 442.)

B. *Any Error in Admitting the Presumptive Drug Test Was Harmless*

On appeal, defendant argues that the trial court should have excluded the probation officer's testimony about the presumptive drug test result because "[a]ll that can be known [about the drug test] is that five strips of an undefined material is apparently dipped into urine, and they then tell us whether drugs are present."

Defendant further argues that the probation officer was erroneously called to testify about the results of the presumptive drug test without first being qualified as an expert on the subject, as it was unclear whether the test employed a generally accepted scientific technique under the *Kelly/Frye* rule.

Assuming defendant preserved his arguments on appeal with his objection below, "[o]bjection . . . [l]acks foundation, calls for expert testimony," (see *People v. Scott* (1978) 21 Cal.3d 284, 290 [objection is sufficient if it "fairly apprises the trial court of the issue it is being called upon to decide"]; but see *People v. Diaz* (1992) 3 Cal.4th 495, 527 [objection on grounds of " 'lack of foundation' " and "hearsay" did not preserve the defendant's claim that admission of scientific evidence at trial violated *Kelly/Frye* rule]), and assuming the evidence was admitted in error (see *People v. Maki* (1985) 39 Cal.3d 707, 715 [trial courts may not admit " 'unsubstantiated or unreliable evidence as substantive evidence' " in probation revocation proceedings]), the error was harmless under any standard (see *Kelly*, *supra*, 17 Cal.3d at p. 40 [applying *People v. Watson* (1956) 46 Cal.2d 818 harmless error analysis to erroneous admission of scientific evidence]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1161-1162 (*Arreola*) [applying harmless beyond a reasonable doubt standard to erroneous admission of preliminary hearing transcript at probation revocation hearing]).

Defendant does not dispute the trial court's findings that he violated his probation on multiple other grounds: failing to report for a scheduled appointment, failing to report a change of address, and violating the law by providing false information to a police officer (§ 148.9, subd. (a)). A court may revoke probation if it has reason to believe a probationer has committed another offense or has otherwise violated *any* of the terms of probation. (§ 1203.2, subd. (a).) Thus, the additional, unchallenged grounds for probation are enough to support the court's decision to revoke defendant's probation and sentence him to prison. (See *Arreola*, *supra*, 7 Cal.4th at p. 1161 [observing that

substantial evidence of numerous probation violations, apart from the probation violation supported by erroneously admitted evidence, supported revocation of defendant's probation].)

Citing *In re Babak S.* (1993) 18 Cal.App.4th 1077 (*Babak S.*) and *People v. Self* (1991) 233 Cal.App.3d 414 (*Self*), defendant argues that where a trial court's revocation of probation is based on more than one ground, the revocation cannot be sustained if one of the grounds of revocation is later determined to be invalid. Defendant maintains that it is unclear whether the court would have sentenced him to state prison in the absence of the ground that he violated probation by using controlled substances.

In *Babak S.*, the juvenile court committed the minor to the California Youth Authority after it found the minor had violated probation by violating a probation order requiring him to live in Iran for two years and failing to report to his probation officer after he returned to the United States. (*Babak S.*, *supra*, 18 Cal.App.4th at pp. 1082-1083.) The juvenile court also heard evidence that the minor had associated with a known probationer. (*Ibid.*) On appeal, a panel from this court concluded that the probation condition requiring that the minor live in Iran was invalid and that the juvenile court improperly relied on the ground that he failed to report to the probation officer. (*Id.* at pp. 1084-1086.) This court then concluded, "Though the court might have found the previous dispositional order ineffective based only upon the minor's violation of the probationer/gang condition, we cannot conclude on this record that the court would have imposed a Youth Authority commitment based solely upon Babak's association with" the probationer. (*Id.* at p. 1089.)

In *Self*, the defendant was convicted of writing checks with insufficient funds. (*Self, supra*, 233 Cal.App.3d at p. 415.) The defendant was found in violation of her probation when the trial court determined that she failed to report regularly, failed to pay restitution, and violated a condition of probation prohibiting her from possessing a

checking account. (*Id*. at pp. 415-416.) The appellate court concluded that the trial court's finding that the defendant failed to pay restitution was invalid because the court did not determine if she had an ability to pay. (*Id*. at pp. 417-419.) The appellate court further concluded that the trial court's finding that the defendant violated the probation condition prohibiting her from possessing a checking account was invalid because the court permitted the prosecution to amend the probation violation petition to allege this violation without giving the defendant notice and the opportunity to be heard. (*Id*. at p. 419.) The appellate court observed that the only remaining ground to support the revocation, the failure to report, was not challenged on appeal, and held that "[a]lthough the [trial] court might, in the exercise of its broad discretion, revoke probation and impose a prison sentence based on that ground alone, on this record we cannot conclude the court would have sentenced defendant to state prison for the middle term based solely on her failure to report" and remanded the matter for resentencing. (*Ibid*.)

Contrary to defendant's arguments, *Babak S*. and *Self* do not compel a conclusion that reversal is required in *every* case where one or more out of several probation violation findings is determined to be invalid by a reviewing court. Whether reversal is required depends on the specific facts presented in each case, and we conclude the record in defendant's case reflects that the court would have sentenced defendant to prison based on the unchallenged violations. Defendant's probation violations were not isolated incidents. Defendant was placed on probation in 2015 in case No. MS334372A, which he violated when he committed the offenses in case No. SS170836A, carrying an unregistered loaded firearm (§ 25850, subds. (a) & (c)(6)) and misdemeanor resisting an officer (§ 148, subd. (a)(1)). After probation was reinstated, he then violated his probation again by failing to appear for an appointment, failing to update his address, and violating the law by providing false information to a police officer—the same offense for which he was on probation in case No. MS334372A.

Defendant's argument further ignores the fact that during the sentencing hearing his own counsel *requested* a 16-month prison term, which the trial court later imposed. During the sentencing hearing, defendant's trial counsel stated, "Rather than impose the execution of sentence or execution of 1170(h) sentence recommended by probation, *we're asking the Court rather to impose a 16-month term in this case*. Given other matters that [defendant] has, we believe that this is the appropriate disposition in this case. *Although* [*defendant*] *would like the assistance of probation, we believe that he's not going to be able to avail himself to these because of obligations in other locations*. So we're asking the Court to impose a 16-month term." (Italics added.)

The fact that defendant's own counsel recommended that the trial court impose a "16-month term" after acknowledging that defendant would not be able to "avail himself" of the "assistance of probation" undermines defendant's claim that it is unclear from the record whether the trial court would have sentenced him to state prison based on the remaining probation violations. As a result, any error in admitting the presumptive drug test was harmless.

III. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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GREENWOOD, P.J.

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DANNER, J.

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